

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2676

To be argued by
PHYLIS SKLOOT BAMBERGER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
EUGENE FRANK IRONS,

Appellant,

-against-

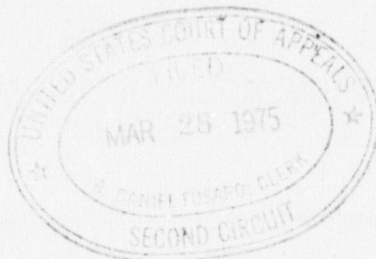
ERNEST L. MONTANYE,
Superintendent,
Attica Correctional Facility,

Appellee.

Docket No. 74-2676

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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UNITED STATES DISTRICT COURT

Jury demand date:

No. 106 Rev.

Civ-74-149

[illegible]

Civ-74-149 The People of the State of N.Y. ex rel Eugene Frank Irons v.

DATE	PROCEEDINGS
1974	
Mar. 25	Filed petition.
25	" order directing Clerk to file w/o prepayment of fees & dismiss petrs. application for writ of habeas corpus, cert. of probable cause is denied, permission to appeal in forma pauperis is denied with the qualification that petr. may file with the Clerk a notice of appeal w/o payment of fees-Curti DJ Notice & copies to Petr. & Louis J. Lefkowitz
25	JS 5 made
25	JS 6 made
Apr. 8	Filed Petitioner's Notice of Appeal (copy mailed to Mr. Lefkowitz, Bflo. and to Clerk, CCA with copy of docket entries)
Aug. 8	File sent to U.S. Court of Appeals
Dec. 26	File retd. from U.S. Court of Appeals
26	Filed copy of order of CCA granting motion for certificate of probable cause, for leave to proceed in forma pauperis and for assignment of counsel
31	Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA

B

CLOSED

Ernest

Date of
Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

The People of the State of New York ex rel.
EUGENE FRANK IRONS,

Relator,

-vs-

ERNEST L. MONTANYE, Supt. of Attica
Correctional Facility,

Respondent.

Petitioner pro se.

After reviewing the papers submitted in this matter and after considering the Magistrate's report, the court adopts the report of the Magistrate in this proceeding. Thus, petitioner's application for a writ of habeas corpus is dismissed.

The Clerk is directed to file the application without prepayment of fees.

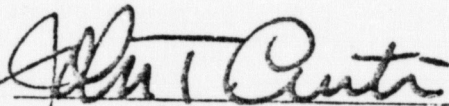
Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied, with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal, without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the

Second Circuit, United States Courthouse, Foley Square,
New York City, for a certificate of probable cause, and
for permission to prosecute an appeal in forma pauperis.

So ordered.

A handwritten signature in dark ink, appearing to read "John T. Curtin", is written over a horizontal line.

JOHN T. CURTIN
United States District Judge

Dated: March 25, 1974

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

The People of the State of New York ex rel.
EUGENE FRANK IRONS,

Relator,

-vs-

ERNEST L. MONTANYE, Supt. of Attica
Correctional Facility,

Respondent.

Petitioner pro se.

Petitioner, who is currently confined to the Attica Correctional Facility, filed with this Court an application for a Writ of Habeas Corpus. He alleges that on April 6, 1966, he was convicted of the crimes of burglary, third degree, and grand larceny, first degree, after trial in the Onondaga County Court and that thereafter on June 16, 1966, he was sentenced to a term of five to ten years. He claims that during the trial the prosecution offered in evidence a search warrant which was void on its face and that there was a failure by his attorney to object to its admission. In a supplementary petition petitioner specifically alleges that the search warrant was invalid on the grounds that it was executed on the tenth day after its issuance and that it illegally authorized

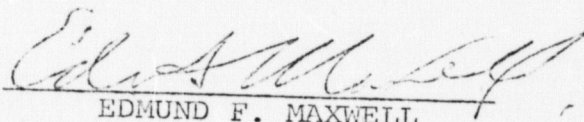
a nighttime search. He further alleges that he had no opportunity to controvert the warrant pursuant to the New York State Code of Criminal Procedure.

On May 14, 1973, at a personal appearance before the undersigned requested by the petitioner, the petitioner alleged that various exhibits to which he had access would be made available for review in furtherance of his claim, and after some delay, copies of such exhibits were furnished. At the time of his appearance, petitioner also indicated that there may have been a proceeding before the Honorable Harold T. Burke relative to petitioner's contentions. A review of the records of this Court reveal that on or about January 16, 1969, petitioner filed a petition for a Writ of Habeas Corpus involving the same conviction for which the instant application is filed. The petition filed on January 16, 1969 also sought relief on the grounds that the search warrant which resulted in the seizure of evidence used against him was invalid. Exhibits attached to one of petitioner's affidavits in the 1969 proceeding were copies of the same exhibits provided to the undersigned in the instant proceeding. On July 7, 1969, in civil action No. 1969-18, Judge Burke found that "The search was a valid and legal search. It was valid as an incident to a lawful arrest. It was also authorized by a valid and legal search warrant.", and denied petitioner's application for a Writ

of Habeas Corpus, on the merits. On October 15, 1969, petitioner's motion for a Certificate of Probable Cause, for leave to proceed in forma pauperis, and for assignment of counsel was denied by the United States Court of Appeals for the Second Circuit.

In view of the above, it is recommended that petitioner's application for a Writ of Habeas Corpus be denied.

Respectfully submitted.


EDMUND F. MAXWELL
United States Magistrate

Dated: Buffalo, New York
March 15, 1974

UNITED STATES COURT OF APPEALS

Second Circuit

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of December, one thousand nine hundred and seventy-four

United States ex rel. Eugene Frank Irons,  
Relator-Appellant,

v.

Ernest L. Mantanye, Superintendent,  
Respondent-Appellee.

FILED

DEC 26 1974

AT.....O'C.....M.  
JOHN K. ADAMS, Clerk

A motion having been made herein by <sup>Appellant</sup> relator pro se for a certificate of probable cause, for leave to proceed in forma pauperis, for transcription of the minutes at the expense of the United States, <sup>and</sup> for the assignment of counsel and for

Upon consideration thereof, it is

Ordered that said motion be and it hereby is

GRANTED

Wilfred Feinberg

William H. Mulligan Circuit Judges

Frederick vP. Bryan

Frederick vP. Bryan

Circuit Judges-  
District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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Civil 1969 -18

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United States ex rel. EUGENE FRANK IRONS

-vs-

VINCENT R. MANCUSTI, Warden, Attica State  
Prison

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FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER

BURKE, District Judge



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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United States ex rel. EUGENE FRANK IRONS

-VS-

Civil 1969-18

VINCENT R. MANCUSI, Warden, Attica  
State Prison

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Petitioner pro se.

Richard R. Jenczka, Assistant Attorney  
General of New York, for the respondent.

FINDINGS OF FACT

1. The petitioner is held on a judgment of the Onondaga County Court entered April 6, 1966 following a trial, where he was represented by counsel. He was sentenced for the crimes of burglary, third degree, and grand larceny, first degree, to a term of 10 to 20 years as a second felony offender. The judgment was affirmed by the Appellate Division on May 9, 1968-no opinion. Permission to appeal was denied by the New York Court of Appeals on November 13, 1968.



2. He claims here (page 6 of petition) that his constitutional rights were violated when evidence was seized under a search warrant that was issued on a Syracuse police officer's hearsay affidavit based on hearsay information.

3. Pursuant to an order of this court, the respondent produced for this court's examination the record of the proceedings at the trial and the record of proceedings held December 29, 1965 at a preliminary hearing at which the petitioner was represented by counsel, also the briefs of the respective parties in the Appellate Division on the appeal from the conviction. The presence of the petitioner was not required on the return of the order to show cause.

4. This court by order of April 24, 1969 denied petitioner's application for a writ of habeas corpus on the merits, on Findings and Conclusions.

5. In Finding of Fact No. 4 in the order dated April 24, 1969 this court found, "The petitioner did not attack the validity of the search warrant before trial, at the trial, nor on the appeal from

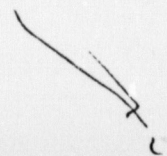
the conviction. The following note appears at the bottom of page 7 of the appellant's brief in the Appellate Division:

'NOTE: Appellant claims that there was raised at this Pre-Trial Hearing as well as at the Trial itself an issue of illegal search and seizure. Examination of the hearing and Trial fails to disclose any such issues. On the contrary, defense counsel on the record clearly acknowledges that the hearing was for the purpose of testing the voluntariness of the confession (hearing minutes p. 1) and permitted the items seized from the defendant to be introduced into evidence at the trial, without objection (p. 84). Therefore, any further development at this point is left to a supplementary Brief to be filed pro se by Appellant if he so desires.'

No such supplementary brief was filed by the appellant pro se in the Appellate Division." Thereafter the petitioner informed this court by letter that he had filed in the Appellate Division a supplemental brief pro se. Thereupon, this court by order dated May 5, 1969 directed the respondent to produce for this court's examination the supplementary brief filed by the appellant pro se in the Appellate Division.

6. The respondent did produce the supplementary brief filed in the Appellate Division, together with papers attached thereto.

7. On the evidence before me I find: the pe-





petitioner was arrested on July 26, 1965 by officers of the Syracuse Police Department at 12:25 A. M. at the Greyhound Bus Station in Syracuse, N. Y. He was carrying two small suitcases. Armed with a search warrant, and exhibiting the search warrant to the petitioner, the police officers searched the suitcases and found that one was filled with jewelry (transcript p. 61). At the trial, the fruits of the search were offered and received in evidence without objection by the petitioner's counsel (p. 84, trial transcript). The search was a valid and legal search. It was valid as an incident to a lawful arrest. It was also authorized by a valid and legal search warrant.

8. The papers which have been produced by the respondent are sufficient to allow this court to determine the questions raised by the petitioner in this proceeding. There is no need for a further hearing.

9. The petitioner had a fair trial. He was not deprived of due process of law, nor equal protection of the law. The judgment of conviction and sentence under attack in this proceeding is a valid and legal

judgment. It was not procured by any violation of the petitioner's rights under the Federal Constitution.

CONCLUSION OF LAW

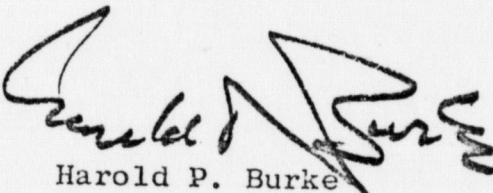
1. The petitioner's application for a writ of habeas corpus is denied on the merits.

IT IS HEREBY SO ORDERED.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

  
Harold P. Burke  
U. S. District Judge

July 3, 1969.







Frank Jones + Eugene Jones

N 12

G 11872

Search Warrant

Frank Jones

104 West 10th Ave.

State of New York,

County of.....

In the Name of the People of the State of New York:

To any Peace Officer in the County of..... Onondaga

Proof, by affidavit, having been this day made before me, by..... Sgt. Duane Motzger

that there is probable cause for believing that..... Frank L. Jones AKA Eugene Frank Jones  
has in his possession one 38 Cal Smith & Wesson S&W Nose revolver  
Serial C-182576 that was stolen in the commission of a burglary  
at room 103-436 S. Salina St. in the City of Syracuse, N. Y. on  
16 July, 1965.

You are, therefore, Commanded ~~to make~~ me, at any time of the day or night.....

.....to make immediate search  
on the person of Frank E. Irons AKA Eugene Frank Irons ~~Frank E. Irons~~ viz.:

in the City Syracuse of Onondaga County of Onondaga N. Y., for  
the following property 1- 38 Cal. Smith & Wesson Revolver (Snub Nose)  
Ser# C-162576.

and if you find the same or any part thereof, to bring it forthwith before me, at NY office in  
the City of Syracuse, County of Onondaga, N. Y.

Dated at the said City of Syracuse County of Onondaga  
N. Y., the 10th day of July, 1995

JUDGE OF

City Court City of Syracuse, N. Y.

\*State grounds of application. §792. If affidavit be positive erase italics. §§793, 797, 801.  
If affidavits are positive that property is on person or in place to be searched strike out italics; if not positive strike off  
following eight words. §801.

Warrant must be executed and returned to magistrate who issued it, if issued in the City and County of New York, with-  
in five days after its date, and if in any other County, within ten days, §802; by whom served, §795; officer may break open  
door or window to execute warrant, if, after notice of his authority and purpose, he be refused admittance, §799; may break open  
door or window to liberate person who entered to aid him or for his own liberation, §800; willful excess of authority or unnecessary  
severity by officer executing is a misdemeanor. §812.

Exhibit #3